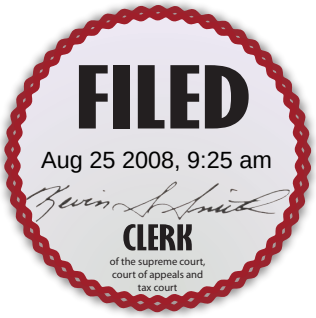

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IN THE
COURT OF APPEALS OF INDIANA

WILLIE CLARK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0801-CR-18
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0703-MR-038277

August 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Willie Clark appeals his conviction for Murder,[1] a felony. He presents the following restated issues for review:

1. Did the State present sufficient evidence to sustain the murder conviction?

2. Did the trial court abuse its discretion in refusing to instruct the jury concerning reckless homicide?

We affirm.

On the afternoon of March 5, 2007, Pierre Brown and his girlfriend, Holly Morgan, were driving in the right-hand lane westbound on 38th Street towards College Avenue to a pawnshop. Another vehicle, driven by Clark, came in the left lane alongside the vehicle driven by Brown. Clark honked the horn as his passenger, Sharese Davidson, yelled at Brown about veering into their lane. Davidson and Brown argued back and forth for a period of time and then Clark cut in front of Brown's vehicle and made a right turn into the Rally's parking lot located at the corner of College Avenue and 38th Street. Brown followed and swerved very close to Clark's car. Brown then exited onto College Avenue and turned into the parking lot of the pawnshop, just north of Rally's. Clark followed and parked next to Brown.

Outside of the pawnshop, Brown argued with Clark through the passenger window of Clark's car. During the heated argument, both individuals referred to "pop and pistol." *Transcript* at 84. Brown, who got out of his vehicle, made reference to a pistol and said, "I'll get mine." *Id*. at 85. Neither man, however, had a gun at the time. As Brown entered the

[1] Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1st Regular Sess.).

pawnshop, Clark drove away saying, "I'm going to come back and kill you and your white bitch." *Id*. at 50. Brown and Morgan then went into the pawnshop for about twenty minutes.

In the meantime, Clark drove to his and Davidson's apartment near 62nd Street and Allisonville Road, retrieved a loaded handgun, and returned to the pawnshop to wait for Brown to come out of the store. Morgan left the store before Brown and saw Clark's car in the parking lot facing College Avenue. Clark walked past her toward the pawnshop and said, "I don't want to do this to you, I don't want to do this to you, but your boy." *Id*. at 55. Clark then walked up to Brown and greeted him in a "real loud and kind of hyper" manner as Brown came out of the store. *Id*. at 202. The men walked behind Brown's vehicle, which was just outside the store, and both of them once again referred to pistols. Clark said, "I don't want to do this to you, I don't want to do this to you, I'm about to have a baby." *Id*. at 59-60. Clark started to walk across the parking lot to his car and then turned around and fired two shots at Brown from a distance of about twelve feet. Both shots hit Brown in the abdomen. Clark then immediately ran to his car and skidded out of the parking lot with Davidson in the passenger seat. He stopped on Winthrop Avenue and disposed of the handgun. Brown was taken to Methodist Hospital and died later that day as a result of his injuries. Brown and Clark were strangers prior to this deadly case of road rage.

The following day, police located a vehicle that matched a description of the one driven by the shooter, which soon led them to Davidson and Clark. Davidson and Clark subsequently gave statements to police implicating Clark in the shooting. In his lengthy statement, Clark acknowledged that he shot Brown after retrieving a gun from his apartment some distance away from the pawnshop. He explained, however, that he was frightened of

Brown because Brown displayed "pointy fingers" like a gun and threatened several times, "I don't fight, nigger, I shoot." *Exhibits* at 78. Clark said Brown threatened him and Davidson many times in the initial encounter outside the pawnshop, while Clark allegedly tried to calm Brown down. When Clark came back to the pawnshop parking lot after retrieving his gun, Clark reported Brown was still using the same sort of "deadly words". *Id*. at 89. Clark indicated to police that he thought Brown had a gun and was reaching for it. According to Clark, when Clark "wasn't in [his] right state of mind", he fired two "unwilling" shots toward Brown in "the heat of the moment". *Id*. at 122, 95, 110.

At his jury trial, Clark defended himself based upon alternative theories of self-defense and voluntary manslaughter. He also requested an instruction on the lesser-included offense of reckless homicide, claiming there was evidence that he closed his eyes just prior to pulling the trigger. The trial court refused to instruct the jury on reckless homicide because it found no serious evidentiary dispute regarding Clark's intent.[2] The jury convicted Clark of murder,[3] and he now appeals.

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[2] The court explained its ruling as follows:

> Court having heard the evidence and argument still doesn't believe that there's a serious evidentiary conflict on the issue of the lesser included. Reckless clearly is a lesser, but there has to be a serious evidentiary conflict. Court doesn't believe in taking those two lines out of context of the entire statement. I think the statement is fairly clear the defendant either intended to shoot in self-defense or intended to shoot because he was angry and that there wasn't, isn't really, in the Court's mind, a serious evidentiary conflict that he accidentally fired or that he shot randomly up in the air. I think everything points in the statement that his act was an intentional act.

Transcript at 519-20.

[3] Clark was also convicted of carrying a handgun without a license, as a C felony. He does not appeal that conviction.

1.

Clark argues the State presented insufficient evidence of intent to support the murder conviction. He acknowledges that he left the pawnshop parking lot to retrieve a handgun and then returned to confront Brown while armed. Relying upon portions of his statement to police, however, Clark claims that he did not intend to kill Brown and that he shot at Brown unwillingly with his eyes closed in an effort to get away from Brown. Thus, he claims he acted recklessly, not knowingly.

We reject Clark's invitation to reweigh the evidence. When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the jury's exclusive province to weigh conflicting evidence.'" *Id*. at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the judgment, we must affirm "'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Clark was charged with knowingly killing Brown. To kill knowingly is to engage in conduct with an awareness that the conduct has a high probability of resulting in death. *See Horan v. State*, 682 N.E.2d 502 (Ind. 1997); Ind. Code Ann. § 35-41-2-2 (West 2004). Intent to kill may be inferred from firing a handgun in the direction of an individual. *See Rhinehardt v. State*, 477 N.E.2d 89 (Ind. 1985); *see also Wadsworth v. State*, 750 N.E.2d 774, 776 (Ind. 2001) ("Wadsworth must have known that firing directly at a person at such

close range is highly probable to result in death").

The evidence favorable to the verdict reveals that after having a heated argument with Brown, Clark drove away while threatening, "I'm going to come back and kill you and your white bitch." *Transcript* at 50. Clark then drove home, retrieved a handgun, and returned some twenty minutes later to confront Brown. During the subsequent confrontation, Clark fired two shots at Brown from a distance of approximately twelve feet. After both shots hit Brown, Clark fled from the scene. The jury was presented with ample evidence to support the murder conviction.

2.

In a related argument, Clark contends the trial court erred when it refused to instruct the jury on reckless homicide as a lesser-included offense of murder. He specifically argues that the jury could have concluded the killing was reckless rather than knowing because one could infer from his statement to police that he closed his eyes just prior to firing the gun at Brown.

When a defendant requests an instruction for a lesser-included offense of the charged crime, a trial court must follow the steps laid out in *Wright v. State*, 658 N.E.2d 563 (Ind. 1995). At issue in this case is the last of these steps: whether there is a serious evidentiary dispute regarding the element distinguishing the greater offense from the lesser offense. *Id*. If such a dispute exists and "a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give [the requested] instruction". *Id*. at 567. When, as in this case, the trial court makes a specific finding that no serious evidentiary dispute exists, we review the court's rejection of the instruction for an

abuse of discretion. *Brown v. State*, 703 N.E.2d 1010 (Ind. 1998).

Reckless homicide is an inherently lesser-included offense of murder, as the only element distinguishing the two is the requisite culpability. *See Miller v. State*, 720 N.E.2d 696 (Ind. 1999). A person acts "'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so", whereas, a person acts "'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." I.C. § 35-41-2-2.

The undisputed evidence establishes that after threatening he was going to come back and kill Brown and Morgan, Clark went home to get his gun. He then returned armed and waited to confront Brown in the parking lot of the pawnshop. After another brief argument, Clark fired two shots directly at Brown from a distance of approximately twelve feet. Even if he closed his eyes while firing the shots (a detail which is far from clearly established in his statement to police), it cannot reasonably be disputed that he knowingly fired them in the direction of Brown. The trial court did not abuse its discretion by concluding that there was no serious evidentiary dispute as to whether Brown knowingly, as opposed to recklessly, killed Brown. *See Sanders v. State*, 704 N.E.2d 119, 122-23 (Ind. 1999) (no serious evidentiary dispute that defendant knowingly shot victim because there was no evidence he was randomly shooting and he "must have known that firing directly at a person at such close range is highly probable to result in death"). Therefore, the trial court did not err in rejecting the proposed instruction on reckless homicide.

Judgment affirmed.

DARDEN, J. and BARNES, J., concur